

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ERIK KELLGREN, Individually and
on Behalf of All Other Persons
Similarly Situated,

Plaintiffs,

v.

PETCO ANIMAL SUPPLIES, INC., *et*
al.,

Defendants.

Case No. 13cv644-L (KSC)

**ORDER DENYING
DEFENDANTS' MOTION TO
DISMISS PLAINTIFF'S FIRST
AMENDED COMPLAINT [DOC.
21-1.]**

____ Pending before the Court is Defendants' motion to dismiss Plaintiffs' First Amended Complaint under Federal Rule of Civil Procedure 12(b)(6). (*MTD* [Doc. 21-1]; *Reply* [Doc. 27].) Plaintiffs oppose. (*Opp'n* [Doc. 25].) The Court found this motion suitable for determination on the papers submitted and without oral argument in accordance with Civil Local Rule 7.1(d.1). (*December 2, 2013 Order* [Doc. 24].) For the following reasons, the Court **DENIES** Defendants' motion.

Also pending before the Court is Plaintiff's fully briefed motion for equitable tolling. (*Equitable Tolling Mot.* [Doc. 28-1].) For the following reasons, the Court **GRANTS** Plaintiff's motion.

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1 **I. BACKGROUND**

2 According to the Complaint, Plaintiff Erik Kellgren worked for Defendants Petco
3 Animal Supplies, Inc. And Petco Holdings, Inc. (“Petco”) from approximately 2007 until
4 October 2010. (*Compl.* ¶ 9.) During this time, Mr. Kellgren worked as an assistant store
5 manager at various locations in Illinois. (*Id.*) The gravamen of Mr. Kellgren’s Complaint
6 was that during his and the collective action members’ employment at Petco, Petco failed
7 to properly compensate Mr. Kellgren and the collective action members for overtime
8 work they performed. (*Compl.* ¶¶ 51, 52.) The only cause of action in the Complaint is
9 for violation of the Fair Labor Standards Act (“FLSA”). (*Id.* ¶¶44-58.)

10 On April 10, 2013, Petco moved to dismiss the Complaint on a number of grounds.
11 (*Previous MTD* [Doc. 3-1].) First, Petco argued that Kellgren’s Complaint was subject to
12 a two-year statute of limitations because he had failed to adequately plead a “willful
13 violation” of the FLSA. (*Id.* 6-9.) Therefore, according to Petco, Kellgren’s FLSA claim
14 was time-barred since he failed his complaint on March 19, 2013. (*Id.* 8-9.) Second,
15 Petco argued that even if Kellgren’s FLSA claim was not time-barred, it was
16 inadequately pled because it was “entirely conclusory and devoid of facts.” (*Id.* 9.)
17 Kellgren opposed, arguing that he had pled facts supporting Petco’s “willful” violation
18 of the FLSA and that he had sufficiently pled the FLSA claim. (*See generally Previous*
19 *Opp’n* [Doc. 8].)

20 On September 13, 2013, the Court granted in part and denied in part Petco’s
21 motion to dismiss. (*September 13, 2013 Order* [Doc. 18].) In that order, the Court found
22 that the original Complaint contained no factual allegations demonstrating that Petco
23 willfully violated the FLSA. (*Id.* 6: 6-17.) The Court granted Kellgren leave to amend
24 to plead willfulness. (*Id.* 7:1-2.)

25 On September 25, 2013, Kellgren filed his First Amended Complaint (“FAC”),
26 adding allegations that Defendants: (1) failed to provide labor budget funds and take into
27 account the impact of the underfunded labor budgets on the job duties of Kellgren and
28 the collective action members; (2) failed to allow Kellgren and the collective action

1 members to record all hours worked; and (3) failed to post or keep posted a notice
2 regarding the minimum and overtime wages. (*FAC* ¶¶ 36, 38, 41, 55, 56.)

3 On October 11, 2013, Petco moved to dismiss the FAC, arguing that Kellgren's
4 additional allegations are entirely conclusory and fail to establish Petco willfully violated
5 the FLSA. (*See generally MTD.*) On December 5, 2013, Kellgren filed an opposition to
6 the motion to dismiss, alleging that he has stated a plausible willfulness claim. (*See*
7 *generally Opp'n.*) On December 12, 2013, Petco filed a reply in further support of its
8 motion to dismiss. (*See generally Reply.*)

9 On March 28, 2014, Kellgren moved for equitable tolling of the FLSA collective
10 members' claims, arguing that equitable tolling is the only way to protect potential
11 collective members' FLSA rights . . . and the FLSA's remedial purposes." (*Eq. Toll.*
12 *Mot.* 1.) Petco opposes, arguing, *inter alia*, that Petco has not prevented any of the
13 potential collective members from pursuing their claims. (*Eq. Toll. Opp'n* [Doc. 29] 7-
14 8.)

16 **II. LEGAL STANDARD**

17 Courts must dismiss a cause of action for failure to state a claim upon which relief
18 can be granted. Fed. R. Civ. P. 12(b)(6). A motion to dismiss under Rule 12(b)(6) tests
19 the complaint's sufficiency. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). A
20 complaint may be dismissed as a matter of law either for lack of a cognizable legal
21 theory or for insufficient facts under a cognizable theory. *Balisteri v. Pacific Police*
22 *Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). In ruling on the motion, a court must "accept
23 all material allegations of fact as true and construe the complaint in a light most
24 favorable to the non-moving party." *Vasquez v. L.A. Cnty.*, 487 F.3d 1246, 1249 (9th Cir.
25 2007).

26 However, the courts are not "required to accept as true allegations that are merely
27 conclusory, unwarranted deductions of fact, or unreasonable inferences." *Spewell v.*
28 *Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). "While a complaint attacked

1 by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a
 2 plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more
 3 than labels and conclusions, and a formulaic recitation of the elements of a cause of
 4 action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Instead, the
 5 allegations in the complaint must "contain sufficient factual matter, accepted as true, to
 6 state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678
 7 (2009) (citing *Twombly*, 550 U.S. at 570). "The plausibility standard is not akin to a
 8 'probability requirement,' but it asks for more than a sheer possibility that a defendant
 9 has acted unlawfully." *Id.*

10 Generally, courts may not consider material outside the complaint when ruling on
 11 a motion to dismiss. *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542,
 12 1555 n. 19 (9th Cir. 1990). However, courts may consider documents specifically
 13 identified in the complaint whose authenticity is not questioned by parties. *Fecht v. Price*
 14 *Co.*, 70 F.3d 1078, 1080 n. 1 (9th Cir. 1995) (superceded by statutes on other grounds).
 15 Moreover, courts may consider the full text of those documents, even when the
 16 complaint quotes only selected portions. *Id.* Courts may also consider material properly
 17 subject to judicial notice without converting the motion into one for summary judgment.
 18 *Barron v. Reich*, 13 F.3d 1370, 1377 (9th Cir. 1994) (citing *Mack v. S. Bay Beer*
 19 *Districts., Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986), *abrogated on other grounds by*
 20 *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104 (1991)).

22 **III. DISCUSSION**

23 **A. Variable Statute of Limitations Under the FLSA**

24 Under the FLSA, claims for unpaid compensation are typically subject to a two-
 25 year statute of limitations. 29 U.S.C. § 255(a). The limitations period may be extended to
 26 three years for a cause of action "arising out of a willful violation" of the statute. *Id.* To
 27 obtain the benefit of the three-year exception, the plaintiff must prove that "the
 28 employer's conduct was willful." *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 135

1 (1988).

2 “A violation of the FLSA is willful if the employer ‘knew or showed reckless
3 disregard for the matter of whether its conduct was prohibited by the [FLSA].” *Chao v.*
4 *A-One Med. Servs., Inc.*, 346 F.3d 908, 918 (9th Cir. 2003) (citing *McLaughlin*, 486 U.S.
5 at 133). Mere negligence on the part of the employer will not suffice. *McLaughlin*, 486
6 U.S. at 133. “If an employer acts unreasonably, but not recklessly, in determining its
7 legal obligation” under the FLSA, its action is not willful. *Id.* at 135 n. 13.

8 With regard to the standard for determining whether a violation is willful, The
9 FLSA’s implementing regulations further provide:

10 (1) An employer’s violation of section 6 or section 7 of the Act shall be
11 deemed “willful” for purposes of this section where the employer knew that
12 its conduct was prohibited by the Act or showed reckless disregard for the
13 requirements of the Act. All of the facts and circumstances surrounding the
14 violation shall be taken into account in determining whether a violation was
15 willful.

16 (2) For purposes of this section, an employer’s conduct shall be deemed
17 knowing, among other situations, if the employer received advice from a
18 responsible official of the Wage and Hour Division to the effect that the
19 conduct in question is not lawful.

20 (3) For purposes of this section, an employer’s conduct shall be deemed to be
21 in reckless disregard of the requirements of the Act, among other situations,
22 if the employer should have inquired further into whether its conduct was in
23 compliance with the Act, and failed to make adequate further inquiry.
24 29 C.F.R. 578.3(c).

25 **B. Plaintiff Has Adequately Pled Willfulness**

26 Petco argues that the FAC fails to plead willfulness sufficiently because Kellgren
27 has not provided any facts showing that Petco knew, or recklessly disregarded, that
28 assistant store managers were improperly classified as exempt from overtime in violation
of the FLSA. The Court disagrees.

Taking into account “all of the facts and circumstances surrounding the violation”
alleged by Kellgren, it is clear that he has sufficiently plead willfulness at this stage of
the proceedings. 29 C.F.R. 578.3(c)(1). Specifically, Kellgren claims that Petco
intentionally underfunded labor budgets, which resulted in him and the collective action

1 members working overtime and performing non-exempt tasks without receiving
2 overtime compensation. (*FAC* ¶¶ 36, 56.) This alone is sufficient to establish that
3 Kellgren has adequately plead willfulness. Moreover, Kellgren alleges that Petco is an
4 “experienced and practical retailer operating over 1,150 stores throughout the country.”
5 (*FAC* ¶ 38.) Considering the size and complexity of Petco’s operation, it is plausible that
6 Petco knew the underfunded labor budgets would cause assistant store managers to
7 perform non-exempt tasks and result in its FLSA violation. *See Donovan v. Simmons*
8 *Petroleum Corp.*, 725 F.2d 83, 85 (10th Cir. 1983) (holding that in light of the size and
9 complexity of its operation, the Employer was generally aware of the law’s requirements
10 and therefore willfully violated the FLSA); *see also Lazaro v. Lomarey Inc.*, No. C-09-
11 02013 RMW, 2012 WL 566340, at *10 (N.D. Cal. Feb. 21, 2012) (finding willfulness
12 partly based on the employer’s background and experience). Kellgren also alleges that
13 his managers saw him and other collective action members perform primarily manual
14 labor and non-exempt duties, which suggests the Defendants knew or should have
15 known that he was not properly classified as exempt. *See* 29 C.F.R. 578.3(c)(3); *see also*
16 *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1280-81 (11th Cir. 2008) (finding
17 Family Dollar’s FLSA violations willful partly based on the evidence showing Family
18 Dollar executives knew that store managers spent most of their time performing manual,
19 not managerial, tasks).

20 In addition, Petco argues that Kellgren’s allegation that it “failed to post a notice
21 explaining the minimum wage and overtime wage requirements is wholly unrelated to,
22 and disconnected from Kellgren’s assertion that assistant store managers were
23 improperly classified as exempt from overtime in violation of the FLSA.” (*MTD* 13.)
24 This argument is completely conclusory, as it does not explain why such allegations are
25 “wholly unrelated to, and disconnected from” Kellgren’s willfulness allegations.
26 Moreover, the Court must consider “[a]ll of the facts and circumstances surrounding” the
27 alleged violation. 29 C.F.R. 578.3(c)(1). So, without more, the Court cannot grant
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1 Petco's request to find that such allegations are completely irrelevant at this stage of the
2 proceedings.

3 The Court is also unconvinced by Petco's argument that its failure to maintain
4 accurate time records does not demonstrate willfulness because it is consistent with its
5 good faith decision to classify an employee as exempt from the FLSA's overtime pay
6 requirement. (*MTD* 14.) The Court finds the argument unconvincing. On the contrary,
7 Petco's alleged violation of FLSA's record keeping requirements may corroborate
8 Kellgren's claim that Petco acted willfully in violation of the FLSA. *See Elwell v. Univ.*
9 *Hosps. Home Care Servs.*, 276 F.3d 832, 844 (6th Cir. 2002) (finding an employer's
10 record keeping practices may corroborate an employee's claims that the employer acted
11 willfully in failing to compensate for overtime).

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13 In light of the foregoing, the Court finds that Kellgren's allegations "contain
14 sufficient factual matter, accepted as true, to state a claim [of willfulness] that is
15 plausible on its face." *See Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 570).

16 **C. Kellgren is Entitled to Equitable Tolling**

17 The statute of limitations for FLSA claims is subject to equitable tolling. *Partlow*
18 *v. Jewish Orphans' Home of S. Cal., Inc.*, 645 F.2d 757 (9th Cir.1981). Although the
19 Ninth Circuit has not articulated a precise standard, there are two general categories that
20 warrant tolling: "(1) where the plaintiffs actively pursued their legal remedies by filing
21 defective pleadings within the statutory period; and (2) where the defendants'
22 misconduct induces failure to meet the deadline." *Adams v. Inter-Con Security Systems,*
23 *Inc.*, 242 F.R.D. 530, 543 (N.D.Cal.2007). The Second Circuit has similarly stated that a
24 court "must consider whether the person seeking application of the equitable tolling
25 doctrine (1) has acted with reasonable diligence during the time period she seeks to have
26 tolled, and (2) has proved that the circumstances are so extraordinary that the doctrine
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1 should apply.” *Zerilli–Edelglass v. N.Y. City Transit Auth.*, 333 F.3d 74, 80 (2d
2 Cir.2003).

3 As an equitable matter, the inquiry should focus on fairness to both parties.
4 *Adams*, 242 F.R.D. at 543. As part of the determination of the possible prejudice to the
5 defendant, the court should ask whether the defendant was aware of the potential scope
6 of liability when the complaint was filed. *Stransky v. HealthONE of Denver, Inc.*, 868
7 F.Supp.2d 1178, 1181–82 (D.Colo.2012). Of particular relevance here, one court has
8 stated that “the time required for a court to rule on a motion ... for certification of a
9 collective action in an FLSA case[] may be deemed an ‘extraordinary circumstance’
10 justifying application of the equitable tolling doctrine.” *Yahraes v. Restaurant Assocs.*
11 *Events Corp.*, 2011 WL 844963 at *2 (E.D.N.Y.2011).

12
13 The potential opt-in plaintiffs could be unfairly prejudiced by the court’s delay in
14 resolving Petco’s motions to dismiss. Petco is not unfairly prejudiced because the
15 potential scope of its liability was known when the Complaint was filed. That is to say,
16 it is reasonable to assume that Petco was well aware of Kellgren’s objective to join all
17 “Collective Action Members” that were non-exempt, hourly employees that worked for
18 Petco during the statutory period. (*See Complaint* [Doc. 1] ¶ 1.) Petco alone possesses
19 the identity of those persons and their work records (hours, pay, etc.) and it unfair to
20 assume that they could somehow have become aware of this litigation without
21 notification. The Court thus tolls the statute of limitations, beginning on the day that
22 Petco’s first motion to dismiss became fully briefed, May 15, 2013.

23 The next issue is when the tolling ceases. Kellgren argues that equitable tolling
24 should cease when Petco eventually files its answer. (*Eq. Toll. Mot. 7.*) Petco does not
25 address this issue, either because it failed to recognize its significance, or because it
26 believed it would win the instant motion to dismiss. Therefore, in its discretion, the
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1 Court **ORDERS** that the statute of limitations is **TOLLED** from May 15, 2013 until
2 Petco files its answer.

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5 **IV. CONCLUSION AND ORDER**

6 In light of the foregoing, the Court **DENIES** Defendants' motion to dismiss the
7 First Amended Complaint and **GRANTS** Plaintiff's motion for equitable tolling.

8 **IT IS SO ORDERED.**

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10 DATED: June 6, 2014

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12 M. James Lorenz
13 United States District Court Judge
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